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In the Supreme Court of the United States

OCTOBER TERM, 1963.

No. 247.

OHIO TURNPIKE COMMISSION,

Petitioner,

vs.

S. J. GROVES & SONS COMPANY,

Respondent.

REPLY BRIEF OF PETITIONER.

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In its brief respondent seeks to divert this Court's attention away from the fact that the court of appeals **did not review the record** and determine that there were issues of material fact requiring trial but instead **accepted** respondent's **contentions** that such issues exist. The factors which are controlling and decisive under Rule 56 were not determined.

The failure to review the record is acknowledged by the express language of the opinion. In that opinion the court of appeals stated that it was unable to satisfactorily review the record. It is thus obvious that it did not do so.

> "* * * There are no findings of fact by the District Judge, since none are required or considered necessary by Rule 52(a), Rules of Civil Procedure, in summary judgment proceedings. Yet we find ourselves unable to satisfactorily review this judgment on the record before us without such findings." Petition, Appendix B, p. 31.

In lieu of reviewing the record the court of appeals based its decision on contentions advanced by the parties: "* * * **It seems that a direct factual issue is presented by** the defendant's **contention** * * *." (Emphasis added; Petition, Appendix B, p. 31.)

By construing the phrase "it seems" as being synonymous with "we find," and by deleting from the quotation the words "by the defendant's contention," respondent arrives at the distorted conclusion, and boldly asserts, that the court of appeals found a direct factual issue in the record before it: "The basis of the decision of the court of appeals is simply that the record before it did not show the absence of a dispute as to any material fact. The court found a 'direct factual issue' regarding the acceptability of certain concrete aggregates. * * *" (Respondent's Brief, p. 5.)

That the court of appeals did not base its decision on the record becomes abundantly clear when the opinion is read in its entirety. The district court had studied that record and tested the contentions of respondent against it. Based on that review Judge Kloeb determined that there was no issue as to any fact material to the following disposition by the court of respondent's contentions: the contract documents, including the plans and specifications, did not misrepresent the work to be performed; the plans were not insufficient; the alleged implied warranties were expressly denied by the provisions of an unambiguous contract. He ruled that the testimony of engineers for the purpose of varying the terms of the contract was immaterial and thus would not be admissible. He found undisputed proof of the defenses of estoppel and accord and satisfaction in the record documents before him. Judge Kloeb determined that on each of several grounds petitioner was entitled to judgment as a matter of law.

Nowhere in its opinion does the court of appeals provide a basis for holding that the district court erred in any one of these rulings. Nowhere in that opinion does it say that the record supports respondent's contentions that there are issues of material fact or that the district court erred in its legal conclusions which were based on that record. A reading of the entire opinion leads to the inescapable conclusion that the court of appeals did not review the record before it. It did not make a determination, as required by Rule 56, that there was a genuine issue of material fact requiring trial or that petitioner was not entitled to judgment as a matter of law. Instead, the court proceeded to engraft the new and unauthorized amendments to the rule discussed in our petition and in so doing provided for itself an escape route which justified its failure to review the record. The court of appeals obviously believed that it was not obligated to apply the tests of Rule 56 if the record appeared to be voluminous, the documents comprising the contract many, or the case otherwise "complex."

As by-products of such a course of action, unsubstantiated contentions overcome undisputed facts; the studied decision of the district court is summarily reversed without a finding of error on his part; and the effective use of Rule 56 by litigants and the courts is eliminated.

Respondent's statement that petitioner seeks judgment regardless of what the facts may be and irrespective of whether the record may have shown disputes of fact (Respondent's Brief, p. 7) is both incorrect and unwarranted. It is petitioner's position, and the district court after study of the record found, that there was no dispute as to any fact material to the determination of the case. The work performed was undisputed (Respondent's Brief, p. 3). The contract documents are of record. Depositions

and affidavits were used to force respondent to make its claims specific. There are no issues of material fact requiring trial. It is because of the facts, not in spite of them, that petitioner is entitled to judgment.

Kennedy v. Silas Mason Co., 334 U. S. 249 (1948), claimed by respondent to be controlling, supports petitioner's position. Judge Kloeb performed the exact functions prescribed for a district court in that case. The record and the issues on appeal remain unchanged. That decision is not authority for the proposition that without reviewing the record an appellate court may accept contentions of the losing party as true and reverse the decision of a district court.

None of the cases cited by respondent is authority for the alteration or disregard of the requirements of Rule 56, thus in effect amending the rule. The decision of the district court is squarely supported by *McArthur Bros. v. United States*, 258 U. S. 6 (1922), and *Kihlberg v. United States*, 97 U. S. 398 (1878).

The confusion and damage which will result from this decision if it is allowed to stand may be illustrated by reference to the series of judicial events which led up to this Court's 1963 amendment to Rule 56(e). While that amendment is not applicable to this case, it is, however, declaratory of pre-existing law as to the duty of both trial and reviewing courts to look behind the contentions of the parties and determine from the record proof before them whether summary judgment can be properly granted. The Advisory Committee so indicates in its 1963 note to (e), which includes this comment:

> "The very mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial. * * *"

If the decision of the court of appeals is permitted to stand, Rule 56 will be emasculated and confusion as to its proper application will permeate the federal judiciary and bar. This case affords an opportunity to this Court to stifle at its inception an impairment to the administration of justice. Therefore the petition for certiorari should be granted.

Respectfully submitted,

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